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No. 87-656

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM E. NELSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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18 pp

QUESTION PRESENTED

Whether petitioner's due process rights were violated by the admission of the testimony of an informant who was promised a fee contingent on the government's evaluation of his overall performance at the conclusion of the case.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Benson v. *United States*, 146 U.S. 325 (1892)	9
Hoffa v. *United States*, 385 U.S. 293 (1966)	7, 9
Lisenba v. *California*, 314 U.S. 219 (1941)	9
Mabry v. *Johnson*, 467 U.S. 504 (1984)	14
Rosen v. *United States*, 245 U.S. 467 (1918)	8
United States v. *Cresta*, 825 F.2d 538 (1st Cir. 1987)	10
United States v. *Crim*, 340 F.2d 989 (4th Cir. 1965)	10-11
United States v. *Curtis*, 520 F.2d 1300 (1st Cir. 1975)	9-10
United States v. *Dailey*, 759 F.2d 192 (1st Cir. 1985)	10
United States v. *D'Antignac*, 628 F.2d 428 (5th Cir. 1980), cert. denied, 450 U.S. 967 (1981)	9
United States v. *Grimes*, 438 F.2d 391 (6th Cir.), cert. denied, 402 U.S. 989 (1971)	10
United States v. *Hodge*, 594 F.2d 1163 (7th Cir. 1979)	10
United States v. *Insana*, 423 F.2d 1165 (2d Cir.), cert. denied, 400 U.S. 841 (1970)	10
United States v. *Jones*, 575 F.2d 81 (6th Cir. 1978)	10
United States v. *Librach*, 536 F.2d 1228 (8th Cir.), cert. denied, 429 U.S. 939 (1976)	9
United States v. *Love*, 767 F.2d 1052 (4th Cir. 1985), cert. denied, 474 U.S. 1081 (1986)	12

Cases—Continued: Page

United States v. *Merida*, 765 F.2d 1205 (5th Cir. 1985) 12-13
United States v. *Mills*, 597 F.2d 693 (9th Cir. 1979) 9
United States v. *Murphy*, 41 U.S. (16 Pet.) 203 (1842) 9
United States v. *Peters*, 791 F.2d 1270 (7th Cir. 1986), cert. denied, No. 85-7237 (Oct. 6, 1986) .. 12
United States v. *Reynoso-Ulloa*, 548 F.2d 1329 (9th Cir. 1977), cert. denied, 436 U.S. 926 (1978) 10
United States v. *Spector*, 793 F.2d 932 (8th Cir. 1986), cert. denied, No. 86-621 (Jan. 12, 1987) .. 10
United States v. *Spivey*, 448 F.2d 390 (4th Cir. 1971), cert. denied, 405 U.S. 927 (1972) 10
United States v. *Valona*, No. 86-2817 (7th Cir. Nov. 20, 1987) 10
United States v. *Walker*, 720 F.2d 1527 (11th Cir. 1983), cert. denied, 465 U.S. 108 (1984) 10
United States v. *Waterman*, 732 F.2d 1527 (8th Cir. 1984), cert. denied, 471 U.S. 1065 (1985) .. 11
Washington v. *Texas*, 388 U.S. 14 (1967) 8
Williamson v. *United States*, 311 F.2d 441 (5th Cir. 1962) 5, 6, 11

Constitution, statutes and rules:

U.S. Const. Amend. V (Due Process Clause) 8
21 U.S.C. 841(a)(1) 2
21 U.S.C. 846 2
21 U.S.C. 952(a) 2
21 U.S.C. 960(a)(1) 2
21 U.S.C. 963 2
Fed. R. Evid.:
Rule 402 8
Rule 601 8
Advisory committee note 9

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OPINIONS BELOW

The amended opinion of the court of appeals panel (Pet. App. A1-A18) is reported at 800 F.2d 452. An earlier opinion of the panel is reported at 793 F.2d 689. The opinion of the en banc court of appeals (Pet. App. A19-A33) is reported at 826 F.2d 310.

JURISDICTION

The judgment of the en banc court of appeals was entered on August 21, 1987. The petition for a writ of certiorari was filed on October 20, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of conspiracy to import marijuana (Count II) and conspiracy to possess marijuana with intent to distribute it (Count I), in violation of 21 U.S.C. 841(a)(1), 846, 952(a), 960(a)(1), and 963. He was sentenced to concurrent four-year terms of imprisonment on each count. The court of appeals, sitting en banc, affirmed (Pet. App. A19-A33).

1. The evidence, the sufficiency of which is not challenged, is summarized in the government's supplemental brief before the en banc court (Supp. Br. 2-4). On December 19, 1983, petitioner met with co-conspirator Humberto Santos and Ronald Sharp and agreed to participate in a marijuana-smuggling venture. Pursuant to the plan, petitioner agreed to provide an airplane and a crew to fly marijuana from Colombia to a small airstrip near Laredo, Texas. After showing Sharp and Santos the airstrip that he had selected, petitioner asked for $250,000 "up front" to pay the expenses of the venture, plus a commission of $40-50 for each pound of marijuana.

Within the next several days, petitioner repeatedly contacted the DEA, recounted details of the scheme to import 20,000 pounds of Colombian marijuana, and offered to act as an informant. The DEA rebuffed petitioner's request that the agency supply him with the needed aircraft; however, petitioner was asked to keep the DEA posted on the progress of the smuggling venture. Petitioner never again reported to DEA agents after December 23, 1983. Supp. Br. 3.

On December 26, 1983, petitioner flew to Miami "to pick up the money" for the smuggling venture. At a meeting with Sharp, Santos, and co-defendant

Adalberto Cervantes-Pacheco, petitioner received from Cervantes-Pacheco a wrapped Christmas package containing $150,000; petitioner gave Sharp $10,000 and kept the remaining $140,000 for himself. Petitioner thereafter returned to Texas. During the next three months, petitioner flew three aborted missions designed to import Colombian marijuana; the first ended when his plane crashed, and the other two ended when he jettisoned the marijuana before landing. Supp. Br. 3.

In the spring of 1984, a fourth operation was planned to import 200,000 pounds of Colombian marijuana by air. Pursuant to this plan, petitioner hired Frank Kelly as a pilot in April 1984. Kelly was a DEA undercover investigator. After receiving word from Santos in late May that the marijuana was ready for transport, Sharp proceeded to Laredo, where he met petitioner and Kelly. As the plan was portrayed, Sharp and Cervantes-Pacheco were to remain in Laredo to "mak[e] sure that the plane g[o]t off the ground"; Santos was to handle the loading of the plane with marijuana in Colombia; co-conspirator "Beto" was to handle offloading operations in Mexico; and co-defendant Jerry Nelson was to reload the marijuana in smaller airplanes so that it could be "circle dropped" at a designated drop zone north of Laredo. During that time, petitioner also demanded an additional $58,000 in "up front" and expense money. Co-conspirator "Beto" provided the additional funds to Sharp, who in turn relayed them to petitioner; at petitioner's direction, Sharp gave Kelly $20,000 for his services. The conspiracy ended on June 6, 1984, before any marijuana was imported. Supp. Br. 3-4.[1]

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[1] Testifying at trial, petitioner admitted the existence of the drug importation conspiracy as outlined by Sharp and

2. The trial evidence further showed that Kelly, who had worked as an "undercover investigator" on 35-40 occasions since 1969 (Tr. 294-296, 449), was contacted in April 1984 by DEA Agent Jimmy Bradley and asked to "infiltrate, gather information * * * and report" on petitioner (Tr. 296-297; see also Tr. 312, 461). In addition to per diem and expenses, Kelly was to receive a payment at the conclusion of the case contingent on the government's evaluation of his overall performance (Tr. 295). Kelly testified that he never discussed payment with the government (Tr. 399, 413-414), that he did not know what criteria the government used in determining his payment in a particular case (Tr. 404), and that he never knew what he would be paid until a case was over (Tr. 385-386, 443-444, 504). As Kelly repeatedly stated, the final amount was always dependent on federal officials in Washington (Tr. 385, 399, 403-404, 421, 479). Kelly unequivocally testified that the amount of the payment did not depend on the ultimate outcome of the case (Tr. 460-461) or on the arrest or conviction of any defendant (Tr. 403-405). Nor did it necessarily depend on the size of the case or whether the case actually went to trial (Tr. 404, 459-460, 479).

DEA Agent Bradley confirmed that he was responsible for recommending to his superiors in Washington the amount Kelly should be compensated (Tr. 659-661, 664). In making recommendations, Agent Bradley subjectively "evaluate[d] different aspects of the case and what [the informant's] participation was in such a case" (Tr. 660). In particular, Agent

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Kelly; however, petitioner claimed that he had only pretended to participate in the venture, in order to sabotage its chances for success.

Bradley considered whether the informant was available when needed, whether he gave complete and accurate information, and whether he was willing to testify (Tr. 661-662). Agent Bradley determined that Kelly had done a "great" job in this case (Tr. 663) and that his cooperation was worth $20,000 (Tr. 663-664)—an evaluation that Agent Bradley reached before Kelly testified (Tr. 681-682). Agent Bradley had not discussed his recommendation with Kelly (Tr. 683).

3. After the government rested, petitioner moved to dismiss the indictment (Tr. 697-698) on the ground that Kelly had received a contingent fee of the sort condemned in *Williamson* v. *United States*, 311 F.2d 441 (5th Cir. 1962).[2] The district court denied the motion, finding both that Kelly was not promised a fee contingent on the conviction of a particular suspect and that the government had reason to believe that petitioner was involved in drug smuggling when it hired Kelly to investigate petitioner's activities (Tr. 698-700).

4. Although a divided court of appeals panel reversed (Pet. App. A1-A18), the court sitting en banc affirmed petitioner's convictions by a vote of 12

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[2] In *Williamson*, the court of appeals reversed the defendants' convictions after an informant was offered a specific sum to "catch" two identified suspects. The *Williamson* court stated (311 F.2d at 444 (footnote omitted)):

> Without some * * * justification or explanation, we cannot sanction a contingent fee agreement to produce evidence against particular named defendants as to crimes not yet committed. Such an arrangement might tend to a "frame up" * * *. The opportunities for abuse are too obvious to require elaboration.

See also *id.* at 445 (Brown, J., concurring).

to 2 (*id.* at A19-A33). At the outset, the en banc court overruled its prior decision in *Williamson.* Rather than subjecting a paid informant's testimony to a "per se exclusionary rule," the en banc court held that "the credibility of the compensated witness * * * is [for a] properly instructed jury to determine" (*id.* at A30). As the court explained (*id.* at A28-A29 (footnote omitted)):

> No practice is more ingrained in our criminal justice system than the practice of the government calling a witness who is an accessory to the crime for which the defendant is charged and having that witness testify under a plea bargain that promises him a reduced sentence. It is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence, but courts uniformly hold that such a witness may testify so long as the government's bargain with him is fully ventilated so that the jury can evaluate his credibility. A witness such as [the informant here] who is paid a fee for his services has less an inducement to lie than witnesses who testify with promises of reduced sentences. It makes no sense to exclude the testimony of witnesses such as [the informant here] yet allow the testimony of informants * * * who are testifying with the expectation of receiving reduced sentences. We therefore * * * [conclude] that the compensated witness and the witness promised a reduced sentence are indistinguishable in principle and should be dealt with in the same way. We therefore hold that an informant who is promised a contingent fee by the government is not disqualified from testifying in a federal criminal trial. As in the case of the witness who has been promised a reduced sentence, it is up to the jury to

evaluate the credibility of the compensated witness.

In reaching this result, the en banc court expressly noted that there was no allegation in this case "that Kelly's testimony was false or that he perjured himself" (Pet. App. A29). Nor would its holding create an undue risk of perjury in future cases. As the court noted, there were already "[a]dequate r[u]les * * * in place to protect against abuses" in the form of discovery requirements, cross-examination, and cautionary jury instructions (*id.* at A29-A30). When such procedures are followed, the court stated, it was fully "confident in * * * the ability of the jury to weigh the defendant's arguments about the inherent unreliability of 'purchased' testimony" (*id.* at A30).

Judge Rubin, concurring, observed that the court's decision was supported by *Hoffa* v. *United States*, 385 U.S. 293 (1966), and by "the decisions of every other circuit" (Pet. App. A31). Judge Goldberg, dissenting, adhered to the view expressed by the panel majority that the payment of contingent fees amounted to "the virtual purchase of perjury" and, accordingly, that Kelly's testimony was "inherently untrustworthy and should have been excluded as such" (*id.* at A17-A18, A31-A32).

ARGUMENT

Petitioner contends (Pet. 2-4) that Kelly's testimony should have been excluded because of Kelly's contingent fee arrangement with the government. In petitioner's view, this arrangement created a "substantial risk of conviction upon perjured testimony" and, as such, was "so repugnant as to constitute a violation of due process" (*ibid.*). As the en banc court of appeals correctly noted (Pet. App. A24),

however, the per se rule of exclusion that petitioner urges has been "rejected * * * either expressly or in principle" both by this Court and by every other circuit that has considered the issue. The Due Process Clause should not be interpreted to exclude testimony pursuant to a contingent cooperation agreement, as long as the substance of the agreement is not concealed and defense counsel has a full opportunity to cross-examine the witness about the terms of the agreement.

At common law, testimony by the defendant, accomplices, and other interested persons was routinely prohibited on the ground that "erroneous decisions were best avoided by preventing the jury from hearing any testimony that might be perjured, even if it were the only testimony available on a crucial issue." *Washington* v. *Texas*, 388 U.S. 14, 21 (1967) (footnote omitted). That practice eroded over time and has now been firmly rejected in favor of a rule that permits the jury to decide on the credibility and weight of testimony in light of all relevant factors. The modern practice rests on the recognition (*Rosen* v. *United States*, 245 U.S. 467, 471 (1918)) that

> the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court, rather than by rejecting witnesses as incompetent * * *.

See also *Washington* v. *Texas*, 388 U.S. at 22. The Federal Rules of Evidence incorporate the modern rule. See Fed. R. Evid. 402 ("[a]ll relevant evidence is admissible," except as otherwise provided); Fed. R. Evid. 601 ("[e]very person is competent to be a

witness," except as otherwise provided); see also Fed. R. Evid. 601 advisory committee note (rule represents a "general ground-clearing [that] eliminates all grounds of incompetency not specifically recognized" by other rules, including "connection with the litigation as a party or interested person").

In applying the modern rule, federal courts have routinely concluded that testimony obtained in exchange for a promise of favorable treatment is admissible. Such testimony does not raise due process concerns, even though the witness has an obvious incentive to lie. This Court has explained that the existence of such an incentive does not render testimony "constitutionally inadmissible," since "[t]he established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury." *Hoffa* v. *United States*, 385 U.S. 293, 311 (1966); see also *Lisenba* v. *California*, 314 U.S. 219, 227 (1941); *Benson* v. *United States*, 146 U.S. 325, 334-337 (1892); *United States* v. *Murphy*, 41 U.S. (16 Pet.) 203 (1842) (owner of stolen goods was a competent witness despite his eligibility to receive a portion of the fine on conviction). The courts of appeals likewise have held that there is no violation of fundamental fairness merely because an accomplice testifies as a government witness in exchange for a promise of favorable treatment. See *e.g.*, *United States* v. *D'Antignac*, 628 F.2d 428, 435-436 (5th Cir. 1980), cert. denied, 450 U.S. 967 (1981); *United States* v. *Mills*, 597 F.2d 693, 697 (9th Cir. 1979); *United States* v. *Librach*, 536 F.2d 1228, 1230 (8th Cir.), cert. denied, 429 U.S. 939 (1976); *United States* v. *Curtis*, 520 F.2d 1300, 1304 (1st Cir.

1975); *United States* v. *Spivey*, 448 F.2d 390, 391 (4th Cir. 1971), cert. denied, 405 U.S. 927 (1972); *United States* v. *Insana*, 423 F.2d 1165, 1168-1169 (2d Cir.), cert. denied, 400 U.S. 841 (1970).

In addition, the courts of appeals have uniformly held admissible the testimony of informant-witnesses who have received fees contingent on the value of their services. Although such fee arrangements may create an incentive to lie, the courts have recognized that "there are strong public policy justifications for permitting law enforcement officials to offer additional incentives to encourage citizens to come forward with knowledge of crimes." *United States* v. *Walker*, 720 F.2d 1527, 1540 (11th Cir. 1983), cert. denied, 465 U.S. 108 (1984). Rather than excluding such testimony on a case-by-case basis, the courts have found it preferable to "leave the entire matter to the jury to consider in weighing the credibility of the witness-informant." *United States* v. *Grimes*, 438 F.2d 391, 396 (6th Cir.), cert. denied, 402 U.S. 989 (1971); accord *United States* v. *Valona*, No. 86-2817 (7th Cir. Nov. 20, 1987), slip op. 19 ("Treating fee arrangements with witness/informants as a credibility factor for the jury rather than an outrageous conduct issue appears to be a more reasoned approach."); *United States* v. *Cresta*, 825 F.2d 538, 545-548 & n.6 (1st Cir. 1987); *United States* v. *Spector*, 793 F.2d 932, 937 n.3 (8th Cir. 1986), cert. denied, No. 86-621 (Jan. 12, 1987); *United States* v. *Dailey*, 759 F.2d 192, 199-200 (1st Cir. 1985); *United States* v. *Hodge*, 594 F.2d 1163, 1167 (7th Cir. 1979); *United States* v. *Jones*, 575 F.2d 81, 85-86 (6th Cir. 1978); *United States* v. *Reynoso-Ulloa*, 548 F.2d 1329, 1338 & n.19 (9th Cir. 1977), cert. denied, 436 U.S. 926 (1978); *United*

States v. *Crim*, 340 F.2d 989 (4th Cir. 1965); see also *United States* v. *Waterman*, 732 F.2d 1527, 1533 (8th Cir. 1984) (en banc), cert. denied, 471 U.S. 1065 (1985). In fact, we know of no case in the quarter-century since *Williamson* in which a court of appeals has ultimately held that an informant's testimony must be excluded because of the informant's fee arrangement with the government.[3]

As the en banc court recognized (Pet. App. A28-A29), there is no basis for treating contingent fee arrangements any differently from agreements involving accomplice testimony. Any such agreement will inevitably provide a witness with a strong motive to fabricate, and most such agreements will have some element of contingency inherent in them. Certainly, it can reasonably be presumed that prosecuting attorneys promise neither favorable treatment nor compensation without some demonstration that the witness has important evidence to provide. Thus, the decision to enter into the agreement in the first instance is invariably contingent on the prosecutor's estimation of the value of the witness's prospective testimony. Furthermore, a witness who is to be compensated on a basis contingent on his overall performance may subjectively believe that his payment will be higher if his testimony results in a successful prosecution. That is equally true, however, when a cooperating accomplice testifies in anticipation of re-

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[3] Judge Davis also noted the absence of such decisions in his panel dissent (793 F.2d at 700 n.2), which is not reprinted in the appendix to the petition. That dissent also gives numerous reasons (*id.* at 696-701) why exclusion of Kelly's testimony would be inappropriate in this case even if *Williamson* were not overruled.

ceiving favorable sentencing treatment.[4] Although each arrangement enhances a witness's interest in the outcome of the case to some extent, "[a] witness * * * who is paid a fee for his services has less an inducement to lie than witnesses who testify with promises of reduced sentences" (*id.* at A28).

As in the case of other types of testimony by interested persons, the possibility that the witness will provide false testimony in order to obtain benefits under a contingent fee agreement is best addressed by fully revealing the terms of the agreement to the defendant. Once defense counsel has thoroughly explored the terms of the agreement on cross-examination, the jury is in a position to scrutinize the witness's testimony with appropriate care.

Here, the government fully disclosed the nature of its fee arrangement with Kelly, and both Kelly and his supervising case agent were thoroughly examined concerning that arrangement at trial. Moreover, there were substantial indications that Kelly's testimony was reliable. Kelly was a professional informant of established reliability who had provided credible testimony in numerous past cases. See, *e.g.*, *United States* v. *Love*, 767 F.2d 1052, 1056-57 (4th Cir. 1985), cert. denied, 474 U.S. 1081 (1986); *United States* v. *Merida*, 765 F.2d 1205, 1217 (5th

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[4] As was cogently stated in *United States* v. *Peters*, 791 F.2d 1270, 1300 (7th Cir. 1986), cert. denied, No. 85-7237 (Oct. 6, 1986):

> Conditioning performance of the agreement upon truthful testimony at trial does not encourage exaggeration or lying, but rather serves as a necessary means to ensure truthful compliance with the plea agreement.

The same rationale is equally applicable when, as in this case, a contingent fee agreement is at issue.

Cir. 1985). As the court of appeals further noted (Pet. App. A29), petitioner "admitted virtually all of the facts elicited during Kelly's testimony, much of which was corroborated by other witnesses." [5] It is therefore hardly surprising that petitioner neither asserted in the court of appeals (see *ibid.*) nor argues now that Kelly's testimony was actually false; he merely asserts that the admission of Kelly's testimony created a "risk" of perjury (Pet. 2-3). But, as the en banc court properly held, that risk is one that is properly dealt with through cross-examination and cautionary instructions (see Tr. 389-390, 1498-1499) rather than through a per se rule of exclusion.

At bottom, petitioner's claim rests on his belief that the government should not be permitted to enter into contingent cooperation agreements with witnesses. But "[t]he Due Process Clause is not a code of ethics for prosecutors; its concern is with the man-

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[5] In his panel dissent, Judge Davis pointed out that there was "overwhelming * * * evidence" independent of Kelly's testimony that supported petitioner's conviction (793 F.2d at 697). As Judge Davis explained in detail (*id.* at 697-698), Kelly's testimony was fully validated by that of accomplice Sharp; indeed, because of his limited participation in the conspiracy, Kelly was able to provide testimony concerning only one of the four planned smuggling episodes and concerning events occurring only during the final six weeks of a conspiracy that lasted nearly six months. By contrast, Sharp provided testimony spanning the entire length of the conspiracy. In addition, as Judge Davis observed (*id.* at 698-699), Kelly's version of events was entirely consistent with petitioner's own trial testimony: although petitioner testified that he acted without criminal intent, he verified the events about which Kelly testified. Thus, petitioner was not, as he now suggests (Pet. 2), "convicted on the strength of testimony * * * bought and paid for by the Government."

ner in which persons are deprived of their liberty." *Mabry* v. *Johnson*, 467 U.S. 504, 511 (1984) (footnote omitted). There is no constitutional basis for treating Kelly's testimony differently from that of any other interested witness.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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